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IN THE

Supreme Court of the United States

October Term, 1957.

No. 903.

MOE WEISE and JAMES LESTER FRENCH,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

1. The "question presented" by the United States, as respondent in opposition to the petition for a writ of certiorari (Br. p. 2), is neither legally nor factually appropriate. The basic question is not the lawfulness of the arrest, but the validity of the search and seizure purportedly made incidental to the alleged lawful arrest. The search and seizure here was concededly made without a search warrant, unmentioned by respondents' "question presented". Respondent has therefore failed to controvert the real issues presented in the petition for a writ of certiorari herein (Pet. pp. 2-3). It virtually concedes that question "3" in the petition must be answered in the affirmative (Br. p. 5, fn. 3; p. 6, fn. 4) and it has made no attempt to answer question "4".

The respondent, in its "question presented", asserts that probable cause for the arrest was predicated upon "information received through a telephonic F.B.I. report" and "corroborated through the personal surveillance of F.B.I. agents" (Br. p. 2). Respondent however omits the fact that the so-called telephonic report was based "solely on anonymous, unverified and hearsay" information (Pet. p. 2), and that the agent who made the telephone call to the arresting officer had no more reliable knowledge of the commission of any offense than did the arresting officer, nor did such agent testify at the trial on the issue of probable cause. Respondent piles unreliable hearsay upon unreliable hearsay to justify "probable cause", asserting that the phone conversation was corroborated by "personal surveillance". Respondent omits to state that the surveillance amounted to no more than observing an automobile carrying boxes tied with twine, string or cord, and seeing "packages" being taken into "different business establishments" which were "reputed to be" purveyors of obscene material (Pet. pp. 3-8).

The record here is irrefutable that neither the arresting officer nor any officer who spoke to him on the phone or followed the petitioners' car had the slightest probable cause to believe that petitioners had committed or were committing a violation of 18 U. S. C. 1465 (Pet. pp. 3-9). Questions "1" and "2" in the petition (p. 2) raise, therefore, along with "3" and "4", serious and substantial constitutional issues which this Court, it is respectfully submitted, should decide.

2. Respondent avoids meeting the issues involved in this case by ascribing to petitioners arguments nowhere advanced in the petition for a writ of certiorari. Thus, it is stated that in effect petitioners urge that to establish

probable cause, the evidence must be such as "would be required to convict at trial" (Br. p. 6), and that the arresting officer could act only upon what he saw, and "not on the facts communicated to him" (Br. p. 7). Respondent appears to have misread the petition (Pet. pp. 14-17).

The question involved here is whether "the facts communicated" to Ralston, the arresting officer, who himself had no personal knowledge, were sufficient to bolster this lack of knowledge and to justify the finding of probable cause upon which the arrest, search and seizure were made. What respondent has not touched upon is this: the officers who spoke to Ralston on the telephone were not called as witnesses by the prosecution; the "facts" which they communicated to Ralston were not personally known to them, and all the so-called "facts" were in the nature of unverified hearsay, rumor and conjecture (Pet. pp. 15-17).*

Respondent concedes that the telephone call to Ralston was predicated on hearsay, solely, but declares that the hearsay cannot be termed "unreliable". (Br. p. 8.) The respondent denies that the hearsay was based "on surmise, or rumor, or evidence of general reputation" (Br. p. 8), but these conclusions are refuted by respondent's own statement of the case (Br. pp. 4-5; see Pet. pp. 3-9).

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*Respondent now states that petitioners "had in fact records of arrest and conviction for activities involving obscene materials [R. 154]" (Br. p. 4, fn. 1). The record reference is to a statement made at time of sentence. The arresting officer did not testify that he had any such knowledge, nor that such knowledge was communicated to him. If probable cause cannot be predicated upon what is eventually found, clearly it cannot be predicated upon what is eventually known after the arrest, search and seizure. See *Johnson v. United States*, 333 U. S. 10, 16.

The fact is that respondent is unable to maintain its position that Ralston acted upon "reliable" information. If Ralston was told that a petitioner once "sold obscene photographs" in the State of Washington (Br. p. 7), respondent is unable to show from the record any evidence to support this assertion; nor does respondent assert that any arrest or conviction followed such alleged sale; nor does respondent show how such an alleged sale supports a finding of probable cause that petitioners had violated 18 U. S. C. 1465.

If "packages" were seen unloaded at establishments "reported to deal in pornography" (Br. p. 7), respondent is unable to show how this unverified assertion can be termed "reliable". Moreover, respondent concedes that the single alleged statement attributed to one of the petitioners came from an "anonymous" informer (Br. p. 8, fn. 5), and respondent's only answer is that before the trial court, petitioners did not request "the identity of the informer" (Br. p. 8, fn. 5). But respondent's testimony did not become more "reliable" because a request for identity was not made: the prosecution never produced the agent who allegedly relayed the anonymous information to Ralston on the phone: and, in any event, the burden of proof to show probable cause for a search and seizure without warrant was upon the prosecution (Pet. p. 13).

Respondent argues that the arrest, search and seizure herein were warranted by this Court's decision in *Brinegar v. United States*, 338 U. S. 160. Petitioners, on the other hand, assert that *Brinegar* was decided on quite different facts; that rightly considered, *Brinegar* condemns the action of the officers here; and that far from being a "stronger" case (Br. p. 6), this case presents

an attempt to extend *Brinegar* to a situation palpably violative of the constitutional guarantees (Pet. pp. 10, 18).

3. Respondent makes no attempt to uphold the validity of the warrant of arrest (Br. p. 5, fn. 3; Br. p. 6, fn. 4). It asserts that the invalid warrant (Pet. pp. 19-20) was merely one of the factors "bearing upon the issue of probable cause to arrest without a warrant" (Br. p. 6, fn. 4).

Such an assertion, however, itself raises a question which this Court should determine. Can a search and seizure made incidental to an alleged lawful arrest without warrant be justified in part on the basis of an admittedly illegal warrant of arrest?

Moreover, respondent overlooks that officer Ralston testified that if he hadn't learned about the invalid warrant of arrest, he didn't know whether or not he would have made the arrest (Pet. p. 8). It would appear, therefore, from the record that the principal reliance of the arresting officer for the arrest, search and seizure was upon a warrant of arrest which was concededly illegal. If the arrest was so tainted, it is submitted that such taint applied equally to the search and seizure which followed.

4. Respondent does not deny that there was time and that it was practical to obtain a search warrant before the search and seizure was made herein (Pet. pp. 20-21). It has ignored this issue, presumably on the basis that the case herein involves a "moving vehicle on a public highway" (Br. p. 6). Nothing in *Brinegar* or *Carroll* supports the view that occupants of a vehicle are without the protection of the provisions of the Fourth and Fifth Amendments. This Court, it is respectfully submitted, should dispel such unwarranted illusion.

Conclusion.

The respondent's brief emphasizes the importance of the questions presented herein. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel.